Supreme Court, U.S.
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No. 99-1332

IN THE

Supreme Court of the United States

DANIEL BROKAMP and DONNA BROKAMP,

Petitioners,

v.

MERCY HOSPITAL ANDERSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO FIRST DISTRICT, HAMILTON COUNTY

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by Petitioners are as follows:

1. Is not the United States Constitution violated when the courts permit a juror to serve (and be the deciding vote) where said juror does not believe that people should be allowed to come to court to ask for money?

2. When, during *voir dire*, a prospective juror fails to fully and/or truthfully disclose personal opinions which override the justice system, the inquiry for the court then is not into the validity of the verdict; but rather, the competency of the juror to sit as a juror in the case, and upholding the constitutional right to impartial jurors are at issue and the *aliunde* rule is inapplicable.

3. If a juror's bias or prejudice is demonstrated which was not honestly disclosed in *voir dire* the trial court has a duty to declare a mistrial and protect the Constitutional guarantee of an impartial jury.

4. Where a plaintiff adduces evidence in support of two conclusions: (1) that the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed the trial court errs in refusing a request to charge the jury on the issue of *res ipsa loquitur*.

5. Where a party has no explanation for the absence of evidence that is normally present, a court should, upon request, instruct the jury as to a negative inference.

6. Great care must be used if a judge questions a witness so as not to seem to become an advocate or give the jury an erroneous impression and a court should not inject its own opinion for that of expert witnesses.

7. A party subjected to clear prejudice by a trial court is denied "due process" under the United States Constitution and should be granted a new trial free of judicial prejudice.

CORPORATE DISCLOSURE STATEMENT OF MERCY HOSPITAL ANDERSON

Mercy Hospital Anderson is a nonprofit/tax-exempt 501(c)(3) corporation. Mercy Health Partners of Southwest Ohio, dba Mercy Health Partners (also a nonprofit/tax-exempt 501(c)(3) corporation) is the Parent/Member Corporation of Mercy Hospital Anderson. Mercy Hospital Anderson is the parent/member corporation of Mercy Hospital Foundation, a nonprofit/tax-exempt 501(c)(3) corporation.

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STATEMENT OF JURISDICTION

Supreme Court Rule 10 states that this Court will only grant a petition in its discretion and only for compelling reasons, and explains the character of the reasons that the Court will consider. These reasons include, but are not limited to, a state court of last resort deciding an important federal question in a way that conflicts with the decision of another state court of last resort or a United States Court of Appeals, a state court or United States Court of Appeals deciding an important question of federal law that has not been, but should be, settled by this Court, or deciding an important federal question in a way that conflicts with a relevant decision of this Court. Rule 10 further explains that a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Petitioners Brokamp have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction.

Petitioners do not and cannot state an adequate basis for jurisdiction because the state court did not decide an important question of federal law and none was presented. *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997). The state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2553, 115 L. Ed. 2d 640 (1991). This Court lacks jurisdiction to review independently supported judgments on direct appeal, and since the state law determination is sufficient to sustain the decree, any opinion of this Court on a federal question would be advisory. *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S. Ct. 459, 462-464, 89 L. Ed. 789 (1945); *see also Sochor v. Florida*, 504 U.S. 527, 533-534, 112 S. Ct. 2114, 2119-2120, 119 L. Ed. 2d 326 (1992).

These issues will be more fully explained below.

STATEMENT OF THE CASE

Petitioners, Daniel and Donna Brokamp, have filed a petition for writ of certiorari against Respondent Mercy Hospital Anderson. [1]

The Petitioners argue that a new trial should have been granted given the "irregularity of the proceedings" and misconduct of the jury.

As to any irregularity in the proceedings, Petitioners assert that the trial judge improperly questioned Petitioners' counsel during trial. What the petition does not state is that said questioning was conducted outside of the presence of the jury and involved only the trial judge and Respondent's counsel.

The specific allegation of juror misconduct is that one of the jurors, Earl Eldridge, identified as Juror No. 4, was not impartial. Two of the jurors informed Petitioners' counsel that one of their members stated that he did not believe that people should be allowed to "come into court and get money." Petitioners claim that Juror No. 4 was untruthful in his responses to questions during *voir dire* and that the failure

1. The petition erroneously identifies James Barringer as a Respondent. Petitioners' complaint filed in the Hamilton County Court of Common Pleas, Hamilton County, Ohio, named as Defendants Mercy Hospital Anderson and John Doe, R.N. Petitioners' state court appeal to the Hamilton County Court of Appeals for the First Appellate District of Ohio (hereinafter "Hamilton County Court of Appeals") also identified only Mercy Hospital Anderson and John Doe, R.N. as defendants-appellees, as did Petitioners' memorandum in support of jurisdiction filed with the Supreme Court of Ohio. Throughout the state court proceedings, Petitioners Brokamp never substituted an identifiable individual for the John Doe, R.N. party. Therefore, Respondent James Barringer is not properly before this Honorable Court as he was not a party to the proceedings in the state court.

to answer truthfully concealed his bias.[2] What the petition does not state is that this exchange occurred while Petitioners' counsel interviewed the jury *after the trial.*

At the trial court level, Petitioners filed a motion for a new trial and for judgment notwithstanding the verdict. This motion contained a brief argument that the alleged jury misconduct deprived Petitioners of a fair trial because they did not have an impartial jury. The constitutional issue of an impartial jury was ancillary, however, to the actual legal issue that the trial court was asked to address. Indeed, any constitutional arguments were ancillary to the legal issue the state courts were asked to address at every level, including most importantly the Hamilton County First District Court of Appeals. At the state court level, the legal dispute was over the applicability of the *aliunde* rule.

The Hamilton County Court of Appeals dealt with Petitioners' arguments about the alleged juror misconduct in a succinct fashion and based entirely upon Evidence Rule 606(B):

> The Brokamps' allegation of juror misconduct, in their first assignment, is the most serious. Specifically, they maintain that one of the jurors failed to truthfully disclose his personal

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2. The actual question asked by the trial court was "[i]s there anybody here that will not follow the law as I give it to you, whether you agree with it or not?" Petitioners recite this question at Page 11 of the petition in Footnote 2. There is no evidence whatsoever that Juror No. 4 answered that question falsely or that he failed to follow the law as required by the trial court. There is no evidence whatsoever that Juror No. 4 allowed his alleged prejudice to dictate his vote. Indeed, five other jurors voted the same way as Juror No. 4. Moreover, the jurors that were interviewed by Petitioners' counsel did not testify that Juror No. 4 attempted to persuade any other member of the jury to agree with him or follow his lead.

> opinions during voir dire, and that this omission prejudicially affected their constitutional rights to a fair trial and an impartial jury. This allegation was presented to the court by proffer from the Brokamps after the verdict had been rendered. Two jurors were then called before the court and questioned about an alleged improper comment.
>
> Evid. R. 606(B) governs the type of evidence that may be considered when a court inquires into the validity of a verdict. This evidentiary rule embodies the aliunde rule, which requires the introduction of evidence from a competent source other than a juror to impeach a jury verdict. [citations omitted]. The jury's verdict may not be impeached by evidence from a member of the jury unless a foundation for the introduction of such evidence is first laid from some other source. [citations omitted]. Here, the only foundation provided was a proffer by the Brokamps' counsel, who did not have firsthand knowledge of the jury deliberations. Such a proffer did not constitute evidence aliunde. [citations omitted]. Because there was insufficient evidence aliunde, we conclude that the trial court did not abuse its discretion in denying the motion for new trial.

Hamilton County Appellate Opinion, Appendix A to petition, Pages 30a-31a. The Hamilton County Court of Appeals concluded that the trial court did not abuse its discretion in denying Petitioners' motion for a new trial. The Supreme Court of Ohio declined jurisdiction.

REASON FOR DENYING THE WRIT

It is virtually impossible to determine from the petition exactly what ruling Petitioners are requesting this Court to review. Assuming, *arguendo*, that the petition seeks review of the rulings by the Supreme Court of Ohio, the law does not permit this Court to review such rulings. While 28 U.S.C.A. does permit review of a decision of the highest state court, a state supreme court's decision to exercise its discretion to decline an appeal is not a judgment or decree reviewable by the United States Supreme Court. *Hill v. Town of Conway*, 193 F.3d 33 (1st Cir. 1999). Appendix B of the petition reflects the ruling of the Supreme Court of Ohio to dismiss the appeal *sua sponte* because no substantial constitutional question exists, and to decline the discretionary appeal. Appendix C reflects the Supreme Court of Ohio's denial of Petitioners' motion for reconsideration of the order reflected in Appendix B.

If the petition seeks to have the Court review the decision of the Hamilton County Court of Appeals, it fails for the following reasons. First, the Hamilton County Court of Appeals decision rested on adequate state law grounds and did not decide an important federal question. Indeed, it did not decide a federal question at all. No state court in the history of this matter decided an important federal question. The Hamilton County Court of Appeals simply decided a state law evidentiary issue in affirming trial court rulings.

In Ohio, a trial court may not consider a post-verdict allegation of juror bias premised upon information disclosed by jurors who participated in the deliberation process absent competent evidence *aliunde*. *Lund v. Kline*, 133 Ohio St. 317, 13 N.E.2d 575 (1938) (slips of paper retrieved from jury room not evidence *aliunde* of juror misconduct). *State v. Adams*, 141 Ohio St. 423, 48 N.E.2d 861 (1943) (*aliunde* rule not applicable where misconduct is by officer of court).

The *aliunde* rule protects a jury verdict and the constitutional elements of a fair trial. The Ohio Supreme Court stated in *State v. Adams*, *supra*, that:

> [T]he [aliunde] rule is based upon considerations of public policy, which, if not adhered to, would encourage further litigation and indefinitely postpone its termination; that to permit a juror to impeach the verdict by his testimony would allow a dissatisfied or corrupt juror to destroy a verdict after he had assented to it; and that to permit such testimony would destroy the privacy of deliberations of the jury and expose the jurors to criticisms and embarrassment.

Id., at 427, 48 N.E.2d 863.

This Court recognized the need for jury verdicts to remain inviolate in the decision in *McDonald v. Pless*, 238 U.S. 264 (1915), when Justice Lamar wisely wrote:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all

> frankness and freedom of discussion and conference.

Id., at 238 U.S. 264, 267-68.

The issue presented to the state courts was the applicability of the *aliunde* rule. The *aliunde* rule is codified in Ohio in Evidence Rule 606(B), and allows inquiry into the validity of a verdict "only after some outside evidence of that act or event has been presented." Ohio Evidence Rule 606(B) provides as follows:

> **Evidence Rule 606. COMPETENCY OF JUROR AS WITNESS**
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> * * *
>
> (B) Inquiry into validity of verdict or indictment
>
> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of

> any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.

Ohio Rule of Evidence 606(B). Evidence in the form of testimony by a member of the jury alleging misconduct of another juror is not evidence *aliunde* that may be used to impeach a verdict. *See State v. Schiebel*, 55 Ohio St. 3d 71, 564 N.E.2d 54 (1990), *cert. denied*, 499 U.S. 961, 111 S. Ct. 1584 (1991) .

Based upon the application of Evid. R. 606(B) and the *aliunde* rules, the Hamilton County Appellate Court concluded that the trial court did not abuse its discretion in denying Petitioners' motion for a new trial. The Hamilton County Appellate Court did not decide an important federal question. Petitioner never presented an important federal question. The state court rulings were based entirely upon state evidentiary rules, and the state law provided adequate grounds. If both the requirements that a federal question has been raised and decided in the state court below do not appear on the record, the appellate jurisdiction of the Supreme Court fails. *Illinois v. Gates*, 103 S. Ct. 2317, 462 U.S. 213, 76 L. Ed. 2d 527, *rehearing denied*, 104 S. Ct. 33, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983). If the federal issue was not presented to the state courts in such a manner that it was necessarily decided by the highest state court, the United States Supreme Court would have no power to consider the issue. *Street v. New York*, 89 S. Ct. 1354, 394 U.S. 576, 22 L. Ed. 2d 572, *on remand* 250 N.E.2d 250, 302 N.Y.S.2d 848, 24 N.Y.2d 1026 (1969). Moreover, Petitioners have never made the argument that the *aliunde* rule violates due process or is unconstitutional.

Furthermore, the petition contains an argument that the trial court was prejudiced against the claims of the Petitioners

and that such prejudice pervaded the entire trial. See Petition, pp. 20-21. At no point, however, does the petition describe how this alleged prejudicial attitude of the trial court affected any specific rulings during the trial. More importantly, the petition never describes how the Hamilton Appellate Court's opinion decided an important federal question related to the trial court's alleged prejudice. The simple reason for this failure is that the Hamilton Appellate Court decision did not decide an important federal question in this regard.

At the state appellate level, Petitioners complained that the trial court prejudiced the entire case because of a factual misconception regarding the location and identification of the nerve that Petitioners' claim was injured by a negligent injection. The only portion of the appellate ruling that addressed the claims of judicial prejudice came at the very end of the opinion when the court stated "After reviewing the record, we cannot say that the trial court demonstrated undue prejudice." Moreover, as pages 21 and 22 of the petition clearly explain, the Petitioners are complaining about the trial court's factual finding regarding the mid-case switch of the nerve at issue. As dictated by Supreme Court Rule 10, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Therefore, the trial court's factual decisions do not constitute a basis for this Court exercising jurisdiction.

Petitioners only discuss the trial court's rulings in their petition. The petition wholly fails to discuss the decision of the Hamilton County Appellate Court. This Court only has jurisdiction to review the decision of the highest state court in which a decision could be had. 28 U.S.C.A. § 1257. Therefore, since Petitioners fail to address or even mention the state appellate court's ruling, this Court should deny the petition.

At the state court level, Petitioners vaguely argued that the Sixth Amendment conferred the right to an impartial jury.[3] In their Hamilton County appellate brief, Petitioners' cited Ohio decisions from criminal cases for the proposition that the Sixth Amendment right to an impartial jury is violated if even one juror is unduly biased or prejudiced. *See State v. Rudge*, 89 Ohio App.3d 429, 624 N.E.2d 1069 (1993). The petition before this Court, however, recites the Fifth, Seventh and Ninth Amendments to the United States Constitution, but not the Sixth Amendment. The Fifth, Seventh and Ninth Amendments were never presented to the state courts and the state courts never decided an important federal issue regarding those Amendments.

CONCLUSION

Only federal questions will be reviewed by this Court on appeal from a state court. Supreme Court Rules 10 and 14. *See also U.S. ex rel. Pascal v. Burke*, 90 F. Supp. 868 (1950) (on review of the judgment of the highest court of a state, the United States Supreme Court will consider only the federal question raised, provided it has been properly brought before the state court). Therefore, this Court should deny the petition for writ of certiorari because it raises exclusively state law issues.

This Court's review function is extremely important and necessary to the working of our federal system. The Supreme Court Rules carefully and clearly delineate the types of cases and reasons for which this Court will exercise its review power. The case presented by this petition does not involve

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3. The Sixth Amendment to the Constitution of the United States is of course more appropriately applied to criminal prosecutions, as it states that "[i]n all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

a substantial or important question of federal law and this Court should decline to issue a writ.

For all of the reasons set forth above, Respondent requests that this most Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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